Supreme Court, U.S.
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114 (3)

# IN THE SUPREME COURT OF THE UNITED STATES

**Case No. 08-632**
ALSC No. 1060813

JANICE ABNER,

Petitioner;

v.

THE SUPREME COURT OF ALABAMA,
MOBILE INFIRMARY MEDICAL CENTER, et al.
Respondent

**On Review of the Decision By the Supreme Court of Alabama**

## REPLY TO BRIEF IN OPPOSITION

Janice Abner, In Pro Se
888 Victor Avenue, Unit 16
Inglewood, California 90302
(310) 412-5710

## TABLE OF CONTENTS

Page

Table of Authorities ..... iii
Preliminary Request for Notice..... 1
Contentions as Arguments
1. Certiorari Should be Granted as Defense in Support of Disposition by the Alabama Supreme Court to Deny Based on Re Judicata is Unmeritorious ..... 2
2. Defendant has Failed to Legally Establish Argument Petitioner is Want of Legal Standing to Bring Underlying Complaint Action ..... 5
3. The Proposition of Untimeliness of Action in Support of Denial of Certiorari by the Supreme Court of Alabama Appears Absent Merit ..... 9
   A. The Notice of Appeal to the Alabama Supreme Court was Timely Brought .... 11
4. Certiorari Should be Granted as Defendant Has Failed to Dispute Charge that the Underlying Action Evolved into Denial of

Constitutional and Civil Rights of Petitioner ..... 11
5. Certiorari Should be Granted as State Law Prohibiting Pro Se Litigant from Bringing Actions is Contradicted by Federal Law.... 14
Conclusion ..... 16
APPENDIX
Notice from the Probate Court of Alabama denying petition for appointment of conservator to determine if any estate of decedent mother existed dated July 27, 2008 ..... App. 1
Notice from the Office of the United States Attorney which the trial court and defendants were provided as evidence in support of pleadings in underlying complaints of wrongful death medical malpractice dated April 13, 2006 ..... App. 2
Request by employer to undergo medical examination due to debilitation to perform job duties dated June 3, 2005 ..... App. 3
Judgement of trail court denying extraordinary writ seeking order for Peer Review Agencies to conduct investigation of complaint against medical parties defendants in current action dated April 15, 2007 ..... App. 4
Notice from the American Bar Association of receipt of concerns against the Alabama Supreme Court in failure to make disposition on petition for writ postmarked September 3, 2008 ..... App. 5

# TABLE OF AUTHORITIES

Page

FEDERAL CASES CITED:

*Cohen v. Beneficial Loan Corp.*, 337 U.S. 547, 559 (1949) ..... 11

*Western Radio Services Inc. v Glickman*, 123 F. 3d. 1189, 1192 (1997) ..... 2

STATE CASES CITED:

*Alabama Power Co. v. Turner*, 557 So. 2d. 551, 562 (1991) ..... 6

*Bame v. City of Del Mar*, 104 Cal. App. 183,190 (2001) ..... 4

*Central Alabama Electric Cooperative v. Tapley*, 546 So. Rptr. 2d, 371, 384 (1989) ..... 6

*City Council of Montgomery v. West*, 42 So. Rptr, 1000, 1003 (1907) ..... 6

*Ghafrey, M.D. et al. v. Korn, M.D., et al.*, 738 Rptr. S. 2d, 778, 782 (1999) ..... 14, 15, 16

*Hasas v. Putin*, 278, Ala., 65, 68, 175 Sl. 2d, 757 (1962) ..... 5

*Kuydendall v. Edmondson*, 87 So. Rptr. 882, 885 (1921) ..... 6

*Trammer v. Bernstein*, 572 S. Rptr. 2d, 572, 575 (1991) ..... 10
*Waters v. Hipp*, 600 So. Rptr. 2d, 981, 982 (1992).. 3

FEDERAL CONSTITUTION CITED:

Amendment XIV ..... 3, 12

FEDERAL STATUTES CITED:

42 U.S.C., §1981 (a) ..... 4, 5

STATE STATUTE CITED:

Alabama Code, § 6-5-410 ..... 3, 5, 7

## PRELIMINARY REQUEST FOR NOTICE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Janice Abner respectfully requests the Court take notice preliminarily of statement of appearance of violation of Court Rules for pleadings by defendant in Brief of Appellee invalid.

The defendants plead a case under nonexistent title by fact of the caption on the reply in opposition to certiorari fails to comport with the title of Writ for Certiorari by petitioner. The afore-referenced petition lists as parties the Supreme Court of Alabama and Mobile Infirmary Medical Center, et al., Respondent, real party in interest. The Brief of Appellee captions Party as solely Mobile Infirmary Medical Center, et al. while pleading a defense for the Supreme Court of Alabama.

The caption of statement for review on cover of Brief of Appellee fails to capture statement for review on cover of Brief of Appellant. The Brief of Appellee on the face of brief states "**On petition for writ of certiorari to the Court of Civil Appeals**." However, no petition for writ was brought by Petitioner to the Court of Civil Appeals of Alabama. The appendixes clearly prove the last

judgment entered denied writ of certiorari by the Supreme Court of Alabama.

**Certiorari Should Be Granted As Defense In Opposition Thereto To Deny Based On Res Judicata Is Unmeritorious**

The Doctrine of Res Judicata operates to bar re-litigation of claims between same parties upon the rendering of a final decision as a judgment on the merits. For Res Judicata to apply, there must be (1) an identity of claims and (2) a final judgment on the merits and identity of parties, Western Radio Servs Co., Inc. v. Glickman, 123 F. 3d. 1189, 1192 (1997).

Defendants assert Res Judicata as bar to grant of certiorari, and submitted judgment dismissing a federal action brought in the year 2004 against identical parties in current action in a complaint for alleged wrongful death-medical malpractice. However, unincorporated in the complaint was the claim for fraud brought in the underlying state claim dismissed in the year 2006. Also, the identity of parties is nonexistent to operate as bar as the plaintiffs in the federal actions were petitioner and father, (Appendix 1, Brief of Appellee in Opposition) whereas in the subsequent state action petitioner was sole plaintiff.

The prior federal complaint alleged violations under Amendment Fourteen of due process (Appendix 1, Brief of Appellee in Opposition, Appendix 7) whereas in contrast, the petition for federal certiorari alleges denial of equal protection under the Due Process Clause of Amendment Fourteen. Therefore, the identity in claims requirement required for Res Judicata to serve as claim preclusion is also absent.

A view of the copy of the year 2004 judgment in the Appendix clearly will reveal Res Judicata did not act to bar underlying state complaint of 2006. Referenced complaint of 2004 was dismissed primarily due to lack of court jurisdiction as plaintiffs failed to establish diversity of citizenship requirement under Alabama Code, § 6-5-410 to bring a wrongful death action in Alabama. In the subsequent state claim the requisite was met.

The Supreme Court of Alabama as the basis for affirming an order granting summary judgment to defendants in a wrongful death declared, "No proceedings has been filed in the Probate Court for the appointment of an appointment or executor," Waters v. Hipp, 600 So. 2d 981, 981 (1992). The referenced basis is inapplicable in Abner v. Mobile Infirmary Medical Center, et al., 2006 as plaintiff, despite absence of estate and as sole heir, did prior petition Probate Court of Alabama seeking

assignment as conservator of any estate if existent, or in the alternative, for a court-appointed conservator. The petition was denied on grounds of non-residency of the state.

It is submitted by fact application for conservator was brought prior to trial by petitioner. Petitioner as plaintiff did satisfy the statutory requirement to bring action. Contention is further held that the initial instant federal action did not act as bar. "Even if the threshold requirements are established, Res Judicata will not be applied if injustice would result, or if the public interest requires that re-litigation be foreclosed," Bame v. City of Del Mar, 104 Cal Rptr. 2d, 183, 190, (2001).

Defendant absent pleading under declaration of perjury asserts the petition for certiorari should be denied on grounds of estoppel as issue of discrimination under §1981 was never raised at any stage of proceedings in the courts (p. 8 Brief in Opposition). The record will prove, if existent and secured from the Appellate Courts of Alabama, contrary. Plaintiff never requested a conformed copy of pleadings upon filing.

The matter of denial of equal rights under §1981 was pleased as cited in the petition for federal writ in the courts of original jurisdiction, the Middle Appellate Court and Court of Final

Jurisdiction of Alabama. Also, the judgments by the appellate court incorporated in the Appendix which defendant claims bear a court seal were never submitted by the Court of Appeals to petitioner.

**Defendant Has Failed To Establish Argument Petitioner Was Want Of Legal Standing To Bring Action For Wrongful Death**

By existent statutory requirements of §6-5-410, the Alabama Wrongful Death Act requires a personal representative bring action as cited by defendants in opposition to certiorari. Defendants argue petitioner is want of legal standing to bring such action under Alabama law, despite invoking a federal right under 42 U.S.C. §1981. The statute affords equal rights for individuals "to make and enter contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of the persons and property as is enjoyed by white citizens."

The Wrongful Death Act of Alabama was enacted in the year 1875 twelve (12) years following abolition of slavery in the United States in 1863. Referenced Act has not been amended. Statutory requisite then, as today, mandated the deceased

own property of an estate and only a personal representative action, Hatas v. Partin, 278 Ala. 65, 175 So. 2d., 757 (1965). The personal representative's primary duty, however, is to distribute among heirs the estate of testate or intestate, Kuydendall v. State, 87 So. Rptr., 882, 885 (1921).

In a challenge to the constitutionality of the Wrongful Death Act, the Supreme Court of Alabama upheld the act as constitutional in opining, "The statute serves to preserve human life, and should be given liberal construction with the Alabama Constitution," Alabama Power Co. v. Turner, 575 So 2d, 551, 562 (1992). However, the Court reduced the jury award. In dissenting, Justice Houston opined:

> "The Constitution of Alabama 1901, Art. I, §1, provides as follows:
>
> "That the great, general, and essential principles of liberty and free government may be recognized and established, *we declare:*
>
> *"That all men* are equally free and independent; that they *are endowed* by their Creator *with certain inalienable rights; that among these are life,* liberty and the pursuit of happiness."

"(Emphasis supplied.) This declaration of the right to life appeared in the Alabama Constitution of 1975 (Art. I, §1), '[A]ll men ... are endowed ... with [the right to] life' -- the right to life that is 'inalienable' (that may not be taken away," ...

"The Alabama Constitution has declared that the citizens of Alabama have a right to life. Art. I, §13, of the Alabama Constitution, provides 'that every person, for any injury done him, in his ... person ..., shall have a remedy by due process of law.' Therefore, with the Constitution declaring that there is both a right to life and a right to a remedy for a violation of that right, it is my opinion that neither the legislature or the judiciary can take way from the citizens of Alabama the right to be compensated for the deprivation of the right to life if that deprivation is caused by the wrong of another. The compensation must be paid to the estate of the decedent, which is a legal extension of the decent beyond death. ...

"Regardless of our feeble attempt to interpret §6-5-410 in the light of imagined common law rights and remedies, there is a constitutional right to life; there is a constitutional right to a remedy for a wrongful deprivation of the right to life. The

> common law is the law of this State *only* 'as it is not inconsistent with the Constitution, laws and institutions of this State.' Ala. Code 1975, §1-3-1. In my opinion, in Alabama it is unconstitutional for the legislature or the judiciary (and I believe that the fault lies exclusively with the judiciary, *Tatum*, 523 So. 2d at 1050-52, 1059-61) to deny the right to compensation for the wrongful death of a person. Constitution Art. I, §§1 and 13." Citing Alabama Constitution," Alabama Power Co. v. Turner, 575 So 2d, 551, 562 (1992).

The Supreme Court in Central Alabama Electric Corp. v. Tapley, 564 So. Rptr., 371, 384 (1989), on review arising from judgment in a wrongful death action, did define wonton or willful behavior in relation as opposed to negligence. "Wanton or willful is sometimes expressed as reckless disregard for the safety of another" Id. 379. As pleaded in the petition for certiorari, the death of near kin according to post autopsy based on medical records arose from misdiagnosis by refusal to secure a third opinion before radical surgery, despite fact diagnostic data was in conflict and ample time exited (Petition for Certiorari, pg. 3). Facts are also pleaded that omission led to death, yet the Alabama Supreme Court denied certiorari

seeking the lower appellate court assume jurisdiction over an appeal seeking to obtain trail for alleged wrongful death, medical malpractice, and fraud by defendants.

Also, the decision by the Supreme Court of Alabama to deny writ was also totally contradictory to Alabama law based on Doctrine of Res Ipsa Loquitor applicable generally in malpractice actions. The doctrine holds a presumption of medical malpractice occurs when multiple physicians are parties in such complaints, 82 ALR 2d, 1227.

**The Proposition Of Untimely Underlying Action In Support Of Disposition By The Alabama Supreme Court To Deny Certiorari Appears Absent Merit**

A four year statute under Alabama law operates for bringing a medical malpractice action based on discovery of fraud. The facts in the record will reveal, as contends the statute was tolled by petitioner exhausting administrative remedies just prior to bringing action as follows:

1. Forwarded correspondence of concern to the office of the United State Attorney, Southern District of Alabama seeking assistance for

acquisition of investigation by Peer Review Agencies of Alabama of local complaint against defendants. Said correspondence clearly stated complaint investigation was sought in the interst of the wellbeing of the public. The complaint was based on an autopsy report which opined misdiagnosis and breached of contract by parties. The private physicians treated purportedly near kin under Medicare, a Federal Act.

2. Submitted settlement proposal to defendants at pre-complaint stage after petitioning the Probate Court for conservator. Offer was rejected and Boyd Reeves as attorney of record responded the parties were unintcrested.

Pursuant to Alabama law, the discovery of fraud by concealment or misrepresentation in medical malpractice actions extends the statute of limitations from two to four years, Trammer v. Bernstein, 596 So. 2d, 572, 575 (1991). As pleaded, a post-autopsy report secure clearly contradicted the cause of death of near kin found by codefendant Mobile Infirmary Medical Center. The final

autopsy report revealed the private diagnostic and attending physicians and acting as respondents for initial autopsy concealed information as did the Medical Center in the first autopsy report.

### A. Timely Appeal Was Made To Supreme Court Of Alabama Of Judgment In Underlying Case

The petition for federal certiorari pleads denial by the Trial Court of Motions by defendants seeking order declaring notice of appeal of judgment dismissing underlying complaint for wrongful death as untimely (Id p.p. 4 and 5). A motion for reconsideration was also denied. Defendants, absent securing appellate review, filed motion to deny appeal (Id. p. 6). In citing Cohen v. Beneficial Loan Corp., 337 U.S. 545, 559 (1948), petitioner did establish appeal was timely brought in courts beginning from the initial jurisdiction to the Supreme Court of Alabama.

**Certiorari Should Be Granted As Defendant Has Failed To Dispute The Underlying Matter Evolved Into Denial Of Constitutional And Civil Rights Of Petitioner**

An issue in the current petition for certiorari is whether or not petitioner was denied equal right to bring wrongful death action and also equal protection of the law by the Appellate Courts of Alabama.

Arguments by petitioner plead a notice was forwarded to the Office of the United States Attorney seeking intervention to secure investigation of complaint against physicians who are defendants in current action by Peer Review Agencies of Alabama. Referenced physicians rendered services purported to near kin under Medicare, a Federal Act, where breached of contract allegedly transpired. Section1981 affords equal treatment pertaining to government contracts. Although denied by defendant absent pleading under perjury, petitioner did factually assert a right to relief under §1981 in each proceeding in the Courts of Alabama.

The petition seeking grant of certiorari by the United States Supreme Court alleges denial under the Equal Protection Clause of Amendment Fourteen of equal treatment in denial of certiorari by the Supreme Court of Alabama. Facts unpleaded are the Court rendered appellate disposition 537 days after petitioner timely filed petition. However, by Alabama Rules of Appellate Practice, Rule 4, which adopts timeframes

recommended by the American Bar Association, appellate dispositions are to be rendered sooner.

In relation to the foregoing pleading, disposition was rendered by the Final Court of Jurisdiction in Alabama only transpired after receipt from petitioner of correspondence to the American Bar Association of concern. The agency did respond, stating the Bar did not intervene in such matters, but submitted a list of Pro Bono law firms.

As pleaded, petitioner was similarly situated to defendant physicians by a degree of semblance in formal education, but was in different racial and gender classification. The Supreme Court of Alabama decided to forego request that defendants respond to the issues in the petition for certiorari (Petition for Certiorari to the United States Supreme Court, p. 6). The Court failed to prior give notice whether or not review would transpire.

Therefore, it is submitted the underlying wrongful death-medical malpractice case did evolve into a constitutional matter.

Petitioner, despite diligence and evidence, has been denied relief for determination if defendants adhered to prescribed norms of medical practice in relation to death of near kin by seven courts of Alabama, beginning in 2004. The courts are the Probate Court of Alabama, two state courts of original jurisdiction, and two United States

District Courts whereby latter federal action sought solely injunctive and declaratory relief to secure Peer Review Agencies of Alabama investigate complaint against physicians. The Assistant Attorney Generals for the State of Alabama are attorneys of record for the Peer Review Agencies, and the director is a state senator. Both level appellate courts in Alabama have denied all actions brought. Review of the latter decision by the District Court is currently before the United States Court of Appeals for the Eleventh Circuit.

**A Certiorari Should Be Granted As Alabama Law Prohibiting Pro Se Representation Departs From Federal Law**

Defendants assert Alabama law prohibits actions brought by pro per litigants citing Ex Parte Ghafrey, M.D. v. Korn, M.D., 738 So. 2d., 778, 782 (1998). The Alabama Legislature enacted law prohibiting pro se litigation to protect the public on the following grounds, as declared in Ghafrey, Id:

1. "By protecting citizens from ignorance and lack of skill on the part of those who are untrained and inexperienced in the law."

2. "By protecting the courts in their administration of justice from the inference from those who are unlicensed, and are not officers of the court."
3. "By preventing the unscrupulous from using the legal system for their own purpose to the detriment of the system and to those who may unknowingly rely on it." Citing Ex Parte Ghafrey, p. 79.

Fore-referenced grounds to bar pro per litigation in Alabama depart from federal rules.

In the reply brief in opposition to writ, defendants report failure of petitioner to appear at hearing of the motion to dismiss underlying complaint. Failure thereof was due to the fact of incapacitation by health problems arising from circumstances in the course of dealing with Alabama in the death of near kin and the circumstances of the death. Petitioner at the time of hearing was without livelihood due to placement on involuntary leave by employer as evidence in Appendix confirms. Petitioner in responsive pleadings in opposition to motions to dismiss provided defenses to each ground supported by facts and legal authorities. Also, documentary evidence was provided, including the notices from the Office of the United States Attorney and document of final autopsy report.

The Supreme Court of Alabama in Ghafrey did hold pro se litigation legal if brought representing only the interest of the litigant. Because petitioner was sole plaintiff in the underlying wrongful death action, and there were no other heirs, a right existed to pro se litigation if unable to obtain legal representation.

Facts plead petitioner did obtain medical expert as to matter whether negligence of defendant led to misdiagnosis, unnecessary surgery, and death of mother. Under Alabama law, the second issue of whether defendants obtained authorization to perform surgery or treat decedent may be established absent an expert witness upon evidence, such as medical records, a layman jury understands.

## Conclusion

Petitioner respectfully requests, based on grounds pleaded, for grant of certiorari by the Honorable Supreme Court of the United States.

Dated: December 13, 2008

Respectfully submitted by:

Janice Abner

Janice Abner, Petitioner

## APPENDIX 1

## NOTICE FROM THE PROBATE COURT OF MOBILE COUNTY, ALABAMA

July 27, 2006

Ms. Janice Abner
886 Victor Avenue, Unit #16
Inglewood, CA 90302

In Re: Petition for Letters of Administration

Dear Ms. Abner:

As per our telephone conversation, I am returning to you the petition to open an intestate estate which was filed in our Court on July 7th, 2006.

Code of Alabama §43-2-22 states (a) No person must be deemed a fit person to serve as executor who is under the age of 19 years, or who has been convicted of an infamous crime, or who, from intemperance, improvidence or want of understanding is incompetent to discharge the duties of the trust. **Nor shall any nonresident of the state be appointed as administrator**

**unless he is at the time executor or administrator of the same estate in some other state or territory or jurisdiction, duly qualified under the laws of that jurisdiction.**

Also, I tracked, on the United States Postal Service website, the certified mail of your money orders for court cost and publication fee. The tracking information states that the item was accepted in INGLEWOOD, CA. It seems that this was sent to you. Please see the enclosed 'Tract and Confirm.' Also, there is a copy of the confirmation of our receipt of your petition for letters of administration.

As I stated earlier, you may want to contact Frank Krusei, the General Administrator for Mobile County, AL. His telephone number is 215-438-9100.

Very truly yours,
Carol Ann George
Judicial Coordinator

## APPENDIX 2

## NOTICE FROM THE OFFICE OF THE UNITED STATES ATTORNEY SOUTHERN DISTRICT OF ALABAMA

April 13, 2006

Alabama State Board of Medical Examiners
Office of the General Counsel
P.O. Box 946
Montgomery, Alabama 36101-0946

RE: Complaint Against Mobile Infirmary Medical Center by Family of Lillian Abner

Dear Sir or Madam:

Enclosed please find a complaint against Mobile Infirmary Medical Center of Mobile, Alabama by the family of Lillian Abner. The complaint was sent to this office by Ms. Abner's family, and is related to the death of Lillian Abner while she was a patient at the Infirmary. Also enclosed in support of the complaint is a letter from Ms. Janice M. Abner, medical records, a pathology report from Mobile Infirmary, and an autopsy

performed by Glenoaks Pathology Medical Group of La Canada, California.

The Glenoaks autopsy concluded that Mrs. Abner "died as a result of hypovolemic (hemorrhagic) shock due to untreated severe post operative blood loss." Report at 3. The autopsy further questions the treatment that Mrs. Abner received, and questions the listed cause of death - cardiac arrest secondary to a nonischemic cardiomyopathy.

Mrs. Abner's family believes that her death at Mobile Infirmary in August, 2002, was the result of negligence, if not gross negligence. At this point, it appears as though it is too late to file a civil action, but the family is concerned that if the issues involved in Mrs. Abner's death are not addressed that others may suffer. Moreover, they also want to get to the bottom of what may be a suspicious death.

We would appreciate it if you could review the enclosed documents to determine if any improper treatment occurred. If you are not the correct person to receive this, I would appreciate it if you would forward this to the appropriate person, agency, division, etc.

If you have any questions, please feel free to contact me. I may be reached at (251) 441-5845.

Sincerely,
DEBORAH J. RHODES
UNITED STATES ATTORNEY
By Eugene A. Seidel
Assistant United States Attorney

## APPENDIX 3

## REQUEST FOR MEDICAL EXAMINATION FROM COMPTON UNIFIED SCHOOL DISTRICT

June 3, 2005

Ms. Janice Marie Abner
888 Victor Avenue #16
Inglewood, CA 90302

U.S. Certified Mail
7002 0510 0004-
3792 9959

Re: Request for Medical Examination

Dear Ms. Abner:

I am writing regarding your current status as an employee with Compton Unified School District. The District is requesting that you agree to be examined by a District-selected physician at District expense. The request is submitted pursuant to Article XII, Section 12.18 of the CEA/ District Collective Bargaining Agreement, which provides as follows:

> 12.18. If the District believes that an [sic] unit member cannot safely or adequately

perform the duties of his/her position, or if a member is using any leave based on an illness or an injury, the District may require that the unit member be examined by a District-selected physician at District expense. This section shall be applicable to members of all Association bargaining units.

As previously conveyed, the District has serious concerns about your ability to safely perform your counseling responsibilities, including interacting with District students as well as properly participating in IEP meetings.

Please confirm in writing that you will agree to the requested examination and, if so, provide any dates in June and July 2005 on which you would not be available for the examination.

Thank you for your cooperation in this matter.

Sincerely,
Jesse L. Gonzales, Ph.D.
Superintendent

## APPENDIX 4

## JUDGEMENT OF THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

| | |
|---|---|
| JANICE ABNER, | ) |
| Plaintiff, | ) |
| | ) CASE NO. CV-06-2470 |
| v. | ) |
| AL BD OF MEDICAL | ) |
| EXAMINERS, et al., | ) |
| Defendants. | ) |

**ORDER**

This case comes before the Court on a "Petition for Peremptory Writ of Mandate" filed by the Petitioner, Janice Abner, on September 19, 2006. Motions to Dismiss were filed by Defendant Alabama Board of Medical Examiners on October 17, 2006, and Defendant Alabama Department of Public Health on October 19, 2006. Subsequent pleadings were also filed by all parties. Two hearings have been held in this case, one on

October 19, 2006, and another on December 4, 2006, during which all parties were allowed to present arguments and additional exhibits.

After reading and considering all pleadings, exhibits and arguments, the Court is of the opinion that the Defendant's Motions to Dismiss are due to be GRANTED.

I tissue therefore the ORDER of the Court that this case be DISMISSED with prejudice and that copies of this Order be transmitted to all parties of record.

DONE and ORDERED this 15 day of April, 2007.

WILLIAM A. SHASHY
CIRCUIT JUDGE

## APPENDIX 5

## NOTICE FROM THE AMERICAN BAR ASSOCIATION

Thank you for taking the time to write. Regretfully, we are unable to provide the type of assistance that you request, as the ABA is a national voluntary legal professional organization. The American Bar Association sponsors a numerous of programs to improve the justice system, but is not able to help people with specific legal problems or cases, as we do not provide legal advice. The Association is also not able to refer you to an attorney. In addition, we do not rank our members or provide information about their credentials to either the public or other members.

If you have complaints about an attorney, judge, or the justice system, please note that the only role that the ABA plays in lawyer discipline is to provide general recommendations and guidelines to state disciplinary authorities and courts for improvements in the disciplinary process. The ABA has no jurisdiction and no authority over state bar associations. Ultimate authority for lawyer discipline in each state lies with the supreme court of that state. Therefore, we are unable to help you with your grievance/ disciplinary complaint.

Please contact the state's disciplinary agency using the enclosed directory.

Enclosed please find a State by State Directory of Pro Bono Programs. Please be specific when contacting the agency so they may address your needs appropriately.

***Please note we have returned your documents with this response.***

Best wishes in your future endeavors.

Best regards,
Frank Brewer
ABA Service Center